

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CLAYTON J. CROSS)	
Claimant)	
VS.)	
)	Docket No. 1,031,571
WAL-MART)	
Respondent)	
AND)	
)	
AMERICAN HOME ASSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) appealed the May 21, 2007, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

In the Application for Hearing filed in this claim, claimant alleged he injured his back at work on May 18, 2006¹, when he felt an extremely sharp low back pain while unloading a trailer and lifting boxes.

On May 16, 2007, the parties appeared before Judge Hursh for a second preliminary hearing in this claim. One of the issues presented to Judge Hursh at that hearing was whether claimant should be granted additional medical treatment. Claimant's attorney presented a March 23, 2007, medical report from Dr. James N. Warren, Jr., to attempt to establish that claimant was entitled to medical treatment on the basis that he had exacerbated his back as a result of unloading freight and lifting boxes for respondent.

Likewise, at the May 16, 2007, hearing, respondent's attorney introduced the February 12, 2007, medical report of Dr. Jeffrey T. MacMillan to attempt to establish that claimant's present symptoms are not the result of claimant's alleged May 2006 accident but, instead, the result of an underlying degenerative condition.

¹ In a preliminary hearing Order dated December 20, 2006, Judge Hursh determined the accident date for this claim was April 18, 2006.

Considering claimant's testimony from the first preliminary hearing, along with the medical reports from Dr. Warren and Dr. MacMillan², in the May 21, 2007, Order, Judge Hursh determined claimant injured or aggravated his low back working for respondent and, therefore, respondent remained liable for claimant's medical treatment. Moreover, as respondent had failed to provide claimant with medical treatment as previously ordered, Judge Hursh determined claimant could obtain medical treatment from the medical provider of his choice at respondent's expense as authorized medical treatment.

Respondent contends Judge Hursh erred. Respondent argues claimant's back injury did not arise out of and in the course of his employment with respondent. Instead, respondent argues claimant's present symptoms are the natural and probable consequence of a prior work-related injury, which claimant sustained in December 2004 and which garnered claimant a lump sum settlement. Respondent also argues claimant initiated this claim because he was terminated. Consequently, respondent requests the Board to reverse the May 21, 2007, Order and deny claimant's request for benefits.

Claimant argues Judge Hursh did not decide the issue respondent now raises on this appeal as it was previously addressed in a preliminary hearing Order entered December 20, 2006. Consequently, claimant argues this appeal is frivolous and should be dismissed.

The issues before the Board on this appeal are:

1. Did Judge Hursh address the issue of whether claimant injured or aggravated his back in an accidental injury that arose out of and in the course of his employment with respondent?
2. If so, did claimant satisfy his burden of proof?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned finds and concludes:

This is the second preliminary hearing in this claim. On December 20, 2006, Judge Hursh ordered respondent to provide claimant with medical treatment for a low back injury after finding claimant injured or aggravated his back on April 18, 2006, while working for respondent. That order was not appealed to the Board.

² The Judge mistakenly identified Dr. MacMillan as Dr. Zimmerman.

But respondent did not comply with the December 20, 2006, Order. Instead, respondent referred claimant to Dr. MacMillan for an evaluation. The doctor examined claimant on February 12, 2007, and promptly forwarded his report to respondent's attorney. The history recited by Dr. MacMillan indicates claimant was unloading a trailer full of freight on April 18, 2006³, when he began experiencing progressively worsening back pain. In short, the doctor concluded claimant's increased back pain related to a degenerative disk at the L5-S1 intervertebral level and was most likely related to an earlier work-related injury and low back surgery. Nonetheless, Dr. MacMillan suggested several different courses of treatment.

After respondent failed to comply with the December 20, 2006, Order to provide claimant with medical treatment, claimant requested another preliminary hearing to address his request for medical treatment and other matters. That hearing was held on May 16, 2007, and resulted in the May 21, 2007, preliminary hearing Order.

Claimant now argues the issue of whether claimant reinjured his back at work was not before the Judge at the May 16, 2007, hearing. But when claimant's attorney introduced Dr. Warren's report at that hearing, he stated:

No, I don't have anything else except to state we're not offering the doctor's opinion letter concerning his examination for the purpose of establishing any disability. We're offering it simply to show that he is of the opinion that there's an exacerbation of preexisting condition beyond a normal progression from second injury at Wal-Mart on March the 6th, repetitive heavy duty labor contributed to his injury.

Based upon the fact that we have a conflict apparently between positions, it may behoove the Court to appoint a third party to examine Mr. Cross and render an opinion.⁴

And, as indicated above, respondent presented Dr. MacMillan's February 12, 2007, report to attempt to establish that claimant's present back complaints were not the result of the alleged April or May 2006 accident at work.

Claimant's argument that Judge Hursh did not consider the issue of whether claimant injured his back at work in April or May 2006 is disingenuous. Indeed, claimant

³ Both the Application for Hearing (E-1) and the Application for Preliminary Hearing alleged May 18, 2006, as the date of accident.

⁴ P.H. Trans. (May 16, 2007) at 5-6.

introduced Dr. Warren's report to address that very issue. Moreover, as indicated above, the Judge specifically held on page two of the May 21, 2007, Order:

The preponderance of the evidence still indicates that the claimant had a reinjury to his low back (aggravation or exacerbation, if you will), and the respondent and insurance carrier remain liable for medical treatment.

The undersigned agrees with Judge Hursh that claimant injured his back at work while unloading freight from trailers. Claimant immediately reported the incident and was sent home early. And the following day claimant was given less physical work to perform. After approximately one week, claimant declined medical treatment and, instead, returned to regular work activities as he was told his work area would lose a safety incentive if he sought medical treatment. In addition, claimant testified that respondent gave its employees who requested medical treatment light duty work that was degrading and humiliating. Consequently, despite his ongoing back symptoms claimant performed regular work activities unloading freight with a forklift until the latter part of October 2006, when he was terminated.

But this is not the first time claimant has injured his back. In December 2004 claimant hurt his back at work and underwent low back surgery. Nevertheless, claimant's testimony and the March 23, 2007, medical report from Dr. Warren establish that claimant's April or May 2006 incident at work aggravated his back to the point he now needs additional medical treatment. In short, claimant was able to perform his manual labor job following his back surgery but the injury he sustained in either April or May 2006 increased his back symptoms. The record is unclear at this juncture whether claimant experienced new symptoms or only increased back pain as a result of the back injury that is the subject of this claim.

This Board Member affirms the Judge's finding that claimant injured his back working for respondent in April or May 2006 and that his accidental injury arose out of and in the course of his employment and that his current need for treatment is a direct result of that accident and subsequent aggravation. Therefore, the May 21, 2007, Order should be affirmed.

Turning now to respondent's failure to comply with the December 20, 2006, Order, the Judge chastised respondent and held that claimant could seek out the medical provider of his choice.

A collateral issue is the respondent's refusal of medical treatment. The respondent was subject to a preliminary order to provide treatment for the claimant's back condition, but refused to provide the treatment recommended by Dr. Zimmerman *[sic]*. The respondent did not have this option while subject to the order. If the

respondent came upon new evidence that it felt could change the court's decision on causation, the respondent could request another preliminary hearing, and seek a new preliminary order. The respondent could not just ignore the existing order. In this case, the respondent and insurance carrier unreasonably refused to provide medical treatment, and the remedy for that circumstance is contained in K.S.A. 44-510j. The claimant may seek medical treatment for his low back symptoms from the medical provider of the claimant's choice, and that medical provider shall be considered the respondent's authorized medical provider, and expenses for treatment from that provider shall be paid by the respondent and insurance carrier as authorized medical expense.⁵

This Board Member affirms that determination. Should claimant suspect respondent has committed fraud or abuse, claimant may consider requesting an investigation under K.S.A. 44-5,120.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned affirms the May 21, 2007, Order entered by Judge Hursh.

IT IS SO ORDERED.

Dated this ____ day of August, 2007.

BOARD MEMBER

c: Frank D. Taff, Attorney for Claimant
Matthew R. Bergmann, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge

⁵ ALJ Order (May 21, 2007) at 2.

⁶ K.S.A. 44-534a.